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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of:	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act	)	
of 1996	)	

COMMENTS OF SBC AND VERIZON

Gary L. Phillips
Roger K. Toppins
Paul K. Mancini
SBC COMMUNICATIONS, INC.
1401 Eye Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8910

Jeffrey S. Linder
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Michael E. Glover
Edward Shakin
VERIZON TELEPHONE COMPANIES
1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-4864

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Table of Contents

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COMMENTS

SBC Communications, Inc. ("SBC")[1] and the Verizon Telephone Companies ("Verizon")[2] respectfully submit their comments on the Commission's Public Notice regarding the use of loop/transport unbundled network element combinations.[3] Sanctioning the use of such combinations to provide special access[4] or private line services would confer an undue windfall on IXCs, who have been using special access services for years but now seek entirely unwarranted discounts from rates that already are disciplined by a robustly competitive market. More importantly, permitting "conversions" of special access (and private line) services to

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[1] The SBC telephone companies are listed in Attachment A.

[2] The Verizon telephone companies are listed in Attachment B.

[3] Public Notice, "Comments Sought on the Use of Unbundled Network Elements To Provide Exchange Access Service," DA 01-169 (Jan. 24, 2001). The Public Notice sought comments on issues raised in two prior decisions. *See* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order, 15 FCC Rcd 1760 (1999) ("Supplemental Order") Implementation of the Local Competition Provisions of the Telecommunications Act, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("Supplemental Order Clarification").

[4] By "special access," Verizon and SBC mean special access and those elements of switched access using dedicated transport. Dedicated transport, as used here, refers to a category of interoffice transport to which access currently is required under the Commission's unbundling rules. *See* 47 C.F.R. § 51.319(d)(1)(i).

loop/transport combinations would be antithetical Section 251(d)(2), under which the Commission cannot consider whether to mandate access to combinations unless it first finds that competitors would be impaired if access were denied. Given the robust competition that exists without reliance on UNEs, the Commission cannot rationally make such a finding here.

Moreover, such a finding would be incompatible with Congress's most fundamental pro-competitive and deregulatory goals. Investment in competing facilities would be deterred, since CLECs could not compete against ILEC facilities priced at artificial, TELRIC-based rates. Investment by ILECs, particularly in advanced services and in rural areas, would be undermined as well, since they would experience a massive revenue shortfall. And the Commission, rather than continuing on its path of deregulating ILEC services as competition emerges, would regressively subject the most competitive ILEC services to a level of regulatory scrutiny exceeding that which applied more than fifteen years ago, when the ILECs were the sole providers of these offerings. The Commission must hold that ILECs are not required to provide access to combinations of unbundled high capacity loops and dedicated transport.

I. INTRODUCTION AND SUMMARY

A. Denying Access to High-Capacity Loop/Dedicated Transport Combinations Would Not "Impair" Competitors.

There are significant differences between the private line/special access market and other local marekts.[5] Special access/private line services are provided to a unique set of customers: large businesses (including IXCs), who spend a great deal of money on telecommunications

[5] As discussed herein, private line and special access services are provided in the same market.

services and generally are located in a concentrated geographic area. Accordingly, by deploying facilities in a limited area – roughly 80 percent of ILEC special access revenues are generated in fewer than 25 percent of wire centers – a CLEC can serve virtually the entire customer base. Moreover, by attracting even a few subscribers, the CLEC can expect to recover its investment relatively quickly. Contrary to the Commission's apparent assumption in the UNE Remand Order, a new entrant in the special access/private line market need not replicate an ILEC's entire network of switches, transport, and loops or build a mass market customer service organization. Through a targeted resource commitment, CLECs can set up shop as a direct competitors of the ILEC for virtually the entire universe of special access/private line customers, and have been doing so since the late 1980s.

The Commission has never focused on the stark differences between special access/private line services and the mass local exchange market. It simply has presumed that access to a high capacity loop/dedicated transport UNE should be required, based on undifferentiated analyses of separate loop and transport UNEs.[6] As the Commission understands, however, "section 251(d)(2) does not compel us, once we determine that any network element meets the 'impair' standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market."[7]

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[6] As explained in the attached Joint Petition, market developments since release of the UNE Remand Order conclusively demonstrate that no competitor is impaired in providing any service by the lack of unbundled access to either high-capacity loops or dedicated transport, let alone the combination of the two.

[7] Supplemental Order Clarification, ¶ 15.

In fact, given these unique characteristics of the special access/private line market, one would expect competition in that market to far outpace competition in other local markets. That is exactly what the facts show. An analysis of the special access/private line market – one that the Commission recognized in the Supplemental Order Clarification should be undertaken – makes clear that competitors are not impaired without access to ILEC loop/transport combinations.[8]

At the time of the UNE Remand Order[9] – after more than fifteen years of facilities-based special access competition – there were more than 100 competitors who collectively earned $5.7 billion from special access/private line services (a ten-fold increase over the preceding four years), had deployed 160,000 fiber miles, and had captured at least 33 percent of the market.[10] Quite evidently, alternatives to ILEC UNE combinations were readily available in the special access/market when the UNE Remand Order was adopted.

But any conceivable doubt that competitors do not need ILEC high-capacity loop/dedicated transport combinations has been dispelled by the continuing growth and pervasive deployment of competitive facilities in the intervening twenty months. There has been a more than three-fold increase in the number of facilities-based competitors, a 35 percent jump in

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[8] As discussed in Section II.D, *infra*, SBC and Verizon (along with BellSouth) are attaching a Joint Petition (Attachment C hereto) which demonstrates that unbundled high-speed loops and dedicated transport do not meet the impairment test. Because these elements do not individually meet the test, the Commission cannot order access to a combination of them.

[9] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696 (1999).

[10] *See* Comments of SBC Communications, Inc., CC Docket No. 96-98, filed Jan. 19, 2000, at 10-11.

CLEC fiber miles, and a 30 percent increase in CLEC special access/private line revenues. There are now more than 600 local fiber networks spread over the top 150 MSAs – and facilities-based CLECs now control at least 36 percent of the special access/private line market.[11]

In addition, there is now a vibrant wholesale market for high-speed loops and dedicated transport.[12] In large, medium-sized, and smaller markets, numerous fiber wholesalers provide scalable, cost-effective, and readily available capacity to new entrants – who, in turn, trumpet in press releases and SEC filings that they can "replace" or "eliminate" ILEC facilities. (Indeed, ILECs themselves have begun to use fiber from these wholesalers.) According to a coalition of these companies, its members "provide, or will provide, advanced fiber-transport services, including interoffice transport, and/or dark fiber to end users and other telecommunications carriers ... in virtually every region of the 'lower 48' states and the District of Columbia."[13] The existence of such a wholesale market, as several CLECs have conceded, effectively precludes a finding of impairment

Given the plethora of competitive alternatives – what one analyst has termed an "avalanche of metro capacity being deployed"[14] – it should come as no surprise that the vast

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[11] "Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport," April 5, 2001 ("Fact Report") at 5 & Table 3.

[12] Notably, these facilities are not limited to cities. Where there are concentrations of demand outside urban areas, CLECs have generally put fiber there. *See* Fact Report at 12.

[13] Coalition of Competitive Fiber Providers, Petition for Declaratory Regarding Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as Amended, to Central Office Facilities of Incumbent Local Exchange Carriers, CC Docket No. 01-77, filed March 15, 2001, at 1.

[14] Fact Report at 14, *citing* J. Grubman, Salomon Smith Barney, *Grubman's State of the Union*, at 15 (March 21, 2001).

majority of the nation's special access revenues are generated in MSAs that qualify for price deregulation under the Commission's Pricing Flexibility Order. Indeed, 80 percent of BOC special access revenue qualifies for Phase I pricing flexibility and nearly two-thirds qualifies for Phase II relief.[15] Having concluded that competition is sufficiently vigorous (without reliance on UNEs) to allow prices to be deregulated, the Commission cannot turn a blind eye to that same competition here.

Because the Commission's pricing flexibility triggers are based on collocation data, which do not consider competition from entities that completely bypass the ILEC, the special access/private line market is even more competitive than these data indicate. CLECs now serve more than one out of every four commercial buildings, and they almost certainly serve a far higher proportion of commercial buildings containing customers who subscribe to high-capacity services. By linking buildings to their fiber networks (which, in turn, are connected to other buildings, IXC POPs, ISPs, and other entities), a CLEC can provide all of a customer's special access and private line needs without any reliance on the ILEC. The emergence of "collocation hotels" (of which there are at least two in 49 of the top 50 MSAs) presents another alternative for bypassing ILEC COs, and the increasing deployment of fixed wireless networks provides still further means of serving high-end customers without utilizing ILEC facilities. The undeniable fact is that alternative facilities to provide special access/private line services are available wherever customers demand such services – whether in cities or rural areas – not just on "limited, point-to-point" routes, as the Commission found in the UNE Remand Order.

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[15] *See* Fact Report at 6-7 & Tables 4-5. SBC and Verizon use the term "BOC" to include GTE.

Finally, SBC and Verizon urge the Commission to step back and consider (even in the absence of the compelling competitive showing summarized above) what "impairment" a user of ILEC special access services could conceivably suffer. IXCs have been using special access services (whether from the ILEC, self-supplied, or from CAPs) for many years without any indication that their ability to provide service has been materially diminished. IXCs simply are seeking to re-price existing services, provided at competitively disciplined rates, using the hypothetical TELRIC methodology. Doing so would not eliminate any impediment to competition; it would only improve their profit margins. That, of course, does not amount to a demonstration of impairment.[16]

B. Mandating Access To High-Capacity Loop/Dedicated Transport Combinations Would Be Inconsistent With Congress's Fundamental Pro-Competitive and Deregulatory Imperatives.

Section 251(d)(2) is only the beginning of the analysis in determining whether to mandate access to a specific UNE.[17] Assuming, contrary to all the evidence, that the impairment showing were met with regard to loop/transport combinations, the Commission still would be required to consider whether mandating access to these combinations of UNEs furthers the Act's central goals of promoting facilities-based competition and implementing a deregulatory policy framework. Because such mandatory access would be directly antithetical to those goals,

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[16] *See* AT&T v. Iowa Util. Bd., 119 S.Ct. 721, 735 (1999) ("the Commission's assumption that *any* increase in cost ... imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services is simply not in accordance with the ordinary and fair meaning of those terms").

[17] *See* UNE Remand Order, ¶¶ 110-113.

restricting access to these combinations is not just permitted, but required, under Section 251(c)(3).

Facilities-based competition. As the Commission has acknowledged, requiring ILECs to make loop/transport combinations available for the provision of special access and private line services would undermine almost two decades of pro-competitive policies that have incented hundreds of entities to invest billions of dollars in competing local exchange facilities.[18] That is only the beginning of the story, however. If ILEC UNE combinations were available at TELRIC rates, investment capital for CLECs would dry up completely. IXCs would pay the steeply discounted TELRIC rates for the combination UNEs equivalent to special access, which no CLEC could hope to match, since TELRIC-based rates are supposed to reflect the underlying costs of a hypothetical maximally efficient competitor. Arbitrarily re-pricing special access from existing, competitively disciplined rates to hypothetical, forward-looking cost would slam the door on capital for competitive investment and turn the idea of using UNEs as a transition to facilities-based competition on its head.

Innovation. The incentive and ability to innovate is inextricably linked with investment. Innovation, as Chairman Powell has recognized, enables transformational changes in our economy.[19] If investment is curtailed, innovation would virtually cease as well. As George Gilder recently cautioned, in discussing precisely the facilities at issue in this Petition:

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[18] *See* Supplemental Order Clarification, ¶ 18 (Mandated access to loop/transport combinations at TELRIC rates would "undercut the market position of many facilities-based competitive access providers.").

[19] Remarks of Michael K. Powell before the Progress & Freedom Foundation, "The Great Digital Broadband Migration," Dec. 8, 2000 ("Powell Remarks"). *See also* Opening Statement of Michael K. Powell before the Subcommittee on Telecommunications and the Internet of the

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> Hundreds of billions of dollars have already been invested by metropolitan fiber-optic network providers ... and optical service providers .... These companies are already rendering the metropolitan DSL debate moot with thousand-fold increases in price performance over existing technology. ... But none of these deployments ... can flourish under a regime of forced sharing of entrepreneurial assets and profits.[20]

Justice Breyer made the same point in his concurring opinion in Iowa Utilities Board: "Increased sharing by itself does not automatically mean increased competition. It is in the *un*shared, not the shared, portions of the enterprise that meaningful competition would likely emerge."[21]

Deregulation. Mandating access to these combinations of UNEs would make a mockery of the Act's prime directive – to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies."[22] Rather than relaxing regulation as competition takes hold, the Commission would be turning the regulatory ratchet even tighter. Indeed, just a few short months after effectively deregulating a significant portion of the special access marketplace in light of burgeoning competition, the Commission would be imposing rate regulation far more stringent than ever was applied when ILECs were the sole suppliers of these services.

(...Continued)
House Committee on Energy and Commerce, March 29, 2001 ("We will redirect our focus onto innovation and investment. The conditions for experimentation and change and the flow of money to support new ventures have often been misunderstood or neglected. If the infrastructure is never invented, is never deployed, or lacks economic viability we will not see even a glimmer of the bright future we envision").

[20] G. Gilder and B. Swanson, "The Broadband Economy Needs a Hero," *Wall St. J.*, Feb. 23, 2001, at A14 ("Gilder").

[21] Concurring Opinion of Justice Breyer, *Iowa Util. Bd.*, 119 S.Ct at 754 (emphasis in original).

[22] H.R. Rep. No. 104-458, 104th Cong., 2d Sess., at 1

Advanced services. Re-pricing access and private line services at TELRIC rates also would be antithetical to the goals embodied in Section 706 of the Act. ILECs would face a revenue reduction of several billion dollars if market-based special access rates were discounted to TELRIC. This loss would not be attributable to legitimate competition; it would stem from pure regulatory arbitrage. The inevitable result would be a sharp decline in investment in DSL, fiber in the loop, and other improvements needed to bring the broadband future to all consumers – particularly in rural areas, where demand is less certain.

Regulatory intervention should be reserved for dysfunctional markets. Where a market, such as that for special access and private line services, is working well, the Commission must resist calls to intercede on behalf of specific competitors.[23]

II. CLECS CAN COMPETE EFFECTIVELY WITHOUT FORCED ACCESS TO HIGH-CAPACITY LOOP/DEDICATED TRANSPORT UNE COMBINATIONS.

A. The Act Requires the Commission To Apply a "Limiting Standard" When Determining Which Elements Must Be Unbundled.

In *AT&T v. Iowa Utilities Board*, the Supreme Court held that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act,"[24] in conducting its impairment analysis under Section 251(d)(2).[25] The Court cautioned that "the Commission

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[23] For similar reasons, the Commission should continue to bar "commingling" of UNEs and access services. Such commingling inevitably would lead to evasion of the ban on using loop/transport combinations to replace access services.

[24] AT&T v. Iowa Util. Bd., 119 S.Ct at 734-35 (1999).

[25] Section 251(d)(2) states that, "In determining what network elements should be made available ... the commission shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network

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cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network," and further warned that an "assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to provide its desired services is simply not in accordance with the ordinary and fair meaning of those terms."[26]

In the *UNE Remand Order*, the Commission concluded that the impairment standard would be met if a requesting carrier would be "materially diminished" in its ability to provide service if, taking into account the possibility of self-provision or obtaining a substitute facility from a third-party, it was denied access to a particular UNE.[27] In undertaking that analysis, "we properly look to actual developments in the telecommunications marketplace before imposing additional unbundling obligations on incumbent LECs; we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards."[28] Importantly, the "type of customers" that a requesting carrier seeks to serve is relevant to the impairment analysis[29]: "In

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(...Continued)
elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

[26] Iowa Util. Bd., 119 S.Ct at 735.

[27] UNE Remand Order, ¶ 51.

[28] Supplemental Order Clarification, ¶ 16; *see also* UNE Remand Order, ¶ 66 ("we find the marketplace to be the most persuasive evidence of the actual availability of alternatives as a practical, economic, and operational matter.").

[29] UNE Remand Order, ¶ 81.

some markets, particularly those markets serving high-volume business customers, it may be practical and economical for competitive LECs to compete using self-provisioned facilities."[30]

As Section II.B explains, the special access/private line market is distinct from the local exchange mass market, and therefore the Commission must engage in a distinct impairment analysis for the services at issue here. And, as detailed in Section II.C, the marketplace evidence confirms that competing providers of special access and private line services would not be impeded by denial of access to ILEC high-capacity loop/dedicated transport combinations.

B. The Commission Must Perform a Separate Impairment Analysis for Loop/Transport Combinations.

As the Commission has recognized, Section 251(d)(2), by focusing on "the services" that the requesting carrier seeks to offer, requires a market-specific analysis.[31] That is an analysis the Commission did not undertake in the UNE Remand Order. Instead, it simply presumed that access to a high-capacity loop/dedicated transport UNE should be required, based on

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[30] *Id.*, ¶ 54. The Commission, of course, already has based an impairment determination on the type/size of customer in declining to mandate universal unbundling of circuit switching. *See* UNE Remand Order, ¶ 276 ("to the extent that the market shows that requesting carriers are generally providing service in particular situations with their own switches, we find this fact to be probative evidence that requesting carriers are not impaired without access to unbundled local circuit switching").

[31] Supplemental Order Clarification, ¶ 18; *see also id.* at n.45 (rejecting AT&T's argument that section 251(c)(3) prohibits a market-specific analysis and noting the Supreme Court's caution that the Act does not create a duty to provide all UNEs for which it is technically feasible to provide access); Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel. Dec. 9. 1999), at ¶ 31 ("it is appropriate to consider the specific services and customer classes a requesting carrier seeks to serve when considering whether to unbundle a network element.").

undifferentiated analyses (now almost 20 months old) of separate loop and transport UNEs used to provide local services to the mass market.

The Commission's UNE Remand Order analysis has no relevant to the special access/private line market. Raising the question of whether the special access/private line and local exchange markets are so "inextricably interrelated" that a separate analysis is impossible, the Public Notice inquires whether the access market (including private lines) is "economically and technically distinct from the local exchange market," considering such factors as the nature of the customer base and the facilities used.[32] The clear answer to this question is "yes": measured across any relevant dimension, special access and private line services are provided in a distinct market from local exchange services.

First, the customer base for special access and private line services is quite different from that for local exchange services. Special access and private line customers are sophisticated, large businesses (including IXCs) that spend a great deal of money on telecommunications services and aggressively seek competitive alternatives. Between 78 and 89 percent of the special access revenues earned by the BOCs comes from customers using DS-1 circuits or above. Such circuits simply are not used by mass market customers. Indeed, the largest customers of special access service are the IXCs themselves, not end users; between 56 and 76 percent of the BOCs'

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[32] Public Notice at 2. The Public Notice also asks whether special access and private line services belong to the same market. *Id.* Such a classification is appropriate. Private line and special access services use the same facilities and are technically equivalent. They are provided by the same vendors to the same group of customers (predominantly large businesses). *See* Fact Report at 5 (noting that the Commission's local competition surveys, the leading independent study of the CLEC industry, and ALTS all treat private lines and special access services as a single category). The only difference (aside from the nominal points of termination) is one of jurisdiction: private line services generally are offered out of the ILECs' state tariffs, while special access services are offered out of the FCC access tariffs.

special access revenues is generated by IXCs.[33] In contrast, residential and small business customers account for almost four-fifths of all local exchange lines but virtually no special access revenues.[34] The large, concentrated revenue base from special access/private line services permits CLECs to recover their costs more rapidly than in the mass market, since each customer they obtain represents a substantial revenue opportunity.

In addition, special access and private line customers, unlike mass market customers, are geographically concentrated. More than 80 percent of Verizon's special access revenues are generated by 20 percent of the wire centers; in SBC's case, fewer than 25 percent of the wire centers account for more than 80 percent of special access revenues.[35] As a result, a CLEC's network is "ubiquitous" for purposes of providing special access/private line services if it addresses the relatively few buildings, wire centers, and IXC POPs that house or serve customers of these services Unlike the local exchange mass market, a CLEC does not need to be capable of connecting one customer to all other customers; nor must a CLEC establish a mass market customer care organization. Rather, by efficiently deploying fiber in specific geographic areas, and targeting its marketing to the buildings or office parks where special access demand is concentrated, a CLEC can efficiently and effectively compete to serve the entire universe of relevant customers.

Second, special access and private line services offer functionalities that are not effectively provided by typical mass market offerings. They are point-to-point circuits that

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[33] Fact Report at 2-3 and Tables 1 and 2.

[34] *See* Fact Report at 4.

[35] Fact Report at 2.

employ "dedicated, high-capacity facilities that run directly between the end user, usually a large business customer, and the IXC's point of presence."[36] They are also highly secure and reliable connections that do not share transmission paths with traffic from other customers. The vast majority of special access/private line circuits are provisioned as high-capacity circuits, in contrast to local exchange facilities, which are overwhelmingly voice grade-equivalent (DS-0) connections.[37]

The special access/private line market therefore is both economically and technically distinct from the mass market. Moreover, as detailed below, it is tailor-made for competitive entry.

C. The Special Access/Private Line Market Is Robustly Competitive Without Mandatory Access to Loop/Transport Combinations.

The marketplace evidence with respect to access and private line services incontrovertibly demonstrates that competitors can and do thrive without using ILEC loop/transport combinations. Competition comes from a multitude of sources – from fiber-based CLECs who pervasively serve every area where there is likely to be a customer needing special access/private line services; from fiber wholesalers who have established carrier-agnostic networks offering a ready, efficient, and scalable source of capacity for new entrants; and from wireless providers

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[36] Supplemental Order Clarification, at n. 36. Similarly, the D.C. Circuit recently noted that "[m]ost users of special access are companies with high call volumes." WorldCom v. FCC, 238 F.3d at 453.

[37] Fact Report at 4. The only digital services provided over 4-wire copper loops are limited to DS-1 capacity (1.544 Mbps). Higher capacity services, including DS3 (45 Mbps) and SONET (such as OC3 and OC12) are always provided over fiber. Another difference between special access and local exchange services is cost: a typical special access circuit costs at least $500 per month; the typical local business line is roughly one-tenth that amount. Fact Report at 4.

who can quickly and inexpensively deploy high-capacity connections wherever their customers may be located. There are competitors who collocate in virtually every ILEC central office serving customers of these services, as well as those who bypass the ILEC network entirely, interconnecting with the ILEC, IXCs, ISPs, and other entities in one of the hundreds of collocation "hotels" that have sprung up in the past two years. The market is rife with non-ILEC alternatives.

In the past two years, the number of facilities-based CLECs has exploded, with 349 companies now competing in the private line/special access marketplace. These entities have deployed 218,000 fiber miles (a 35 percent increase since 1999) and enjoy access/private line revenues of $7.4 billion. In fact, CLECs control 36 percent of the special access/private line market, up from 33 percent in 1999.[38]

Notably, this competition is not limited to large urban areas.[39] There are now 635 fiber networks in the top 150 MSAs (compared to 486 two years ago), with 77 of the top 100 MSAs served by at least 3 CLEC networks, 47 served by at least 5 CLEC networks, and 27 served by at least 7 CLEC networks. The top 10 MSAs are served by an average of 14 CLEC networks, and the top 50 by an average of 6.[40] Competitive facilities exist wherever there is demand for them, whether in downtown areas of large cities or in suburban or rural office parks.

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[38] Fact Report at 6 and Table 3.

[39] To cite just two examples among many, KMC has deployed fiber networks in 37 "Tier 3" markets (places with between 100,000 and 750,000 people) and American Fiber Systems is deploying fiber networks in 131 cities (mostly Tier 2 and Tier 3) in 41 states. *See* "KMC Targets Efficiency in Face of Tough Market," Telecommunications Reports, April 2, 2001, at 33-34; Fact Report at 18.

[40] Fact Report at 11.

The ubiquity of facilities-based competitors in the special access/private line market is confirmed by the tremendous number of CLECs collocating in ILEC central offices – or, more accurately, the number collocating in the very central offices that account for the lion's share of special access/private line revenues:

Special Access Revenues Covered by Collocation in the 320 BOC/GTE MSAs[41]

Percent of Special Access Revenues in the MSA Covered by One or More Fiber-Based Collocators	Number of MSAs Nationwide	Number in Top 50 MSAs Nationwide	Percent of Total RBOC Special Access Revenues
30	183	42	80
65	154	33	64

In light of this pervasive collocation, the Commission in the past few months has effectively deregulated special access rates in MSAs accounting for more than half of SBC's and Verizon's special access revenues.[42] To date, the Commission has declined to equate the pricing flexibility showing with a no-impairment finding. The collocation data, however, confirm that vigorous special access competition is possible without access to UNE combinations across a wide range of geographic markets. That alone should be sufficient to show that carriers are not impaired, not just in those wire centers but for the entire service. If the services are so

[41] For source information, *see* Fact Report at 6-7 and Tables 4-5. Note also that there are additional collocation facilities serving the MSAs that do not meet the Commission's pricing flexibility benchmarks.

[42] The D.C. Circuit expressly agreed with the Commission that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior," and that MSAs "best reflect the scope of competitive entry." WorldCom

(Continued...)

competitive that no price restraint is necessary for the retail services for a large portion of the market, then there can be no need for UNEs at artificially reduced prices at all. In the case of pricing freedom, the Commission looked at whether customers had an actual choice so that the incumbents could not dictate monopoly prices. Here, the question is whether competitors are able to enter the market without reliance on UNEs. There need not be actual entry to show that carriers can enter. As Chairman Powell has explained, evidence of facilities deployment "strongly suggests" that competitors "are not significantly impaired," both in areas where they have deployed "and in areas in which they have not done so."[43] Because the Commission already has concluded that carriers *have entered*, it must mean that they *can enter*. Having concluded that competition is sufficiently vigorous (without reliance on UNEs) to allow prices to be deregulated, the Commission cannot turn a blind eye to that same competition here.

Even the vibrant competition demonstrated by the collocation data considerably underestimates the extent of marketplace alternatives, since it "fails to account for the presence of competitors that ... have wholly bypassed incumbent LEC facilities."[44] For example, those data do not include numerous carriers' carriers – including MFN, American Fiber Systems, Fiberworks, and several others – which have built and continue to deploy "carrier-agnostic" networks that provide a ready, cost-effective, and pervasive source of capacity for new entrants.[45]

(...Continued)
v. FCC, 238 F.3d 449, 458, 461 (D.C.Cir. 2001).

[43] *See* 1999 FCC LEXIS 5663 at **49.

[44] *Id.* at 462, *citing* Pricing Flexibility Order, ¶ 95.

[45] *See* Fact Report at 14-21 & Table 6.

An individual CLEC's costs of providing alternative dedicated transport services can be kept to a minimum by leasing capacity from a fiber wholesaler, taking only as much capacity as it needs and scaling its network to match demand.

Fiber wholesalers have built metropolitan fiber networks in dozens of cities of all sizes – not just in the largest markets.[46] They "provide, or will provide, advanced fiber-based transport services, including interoffice transport ... in virtually every region of the 'lower 48' and the District of Columbia."[47] In fact, as numerous CLECs have stated in press releases and SEC filings, capacity from these wholesalers – and from additional suppliers, including IXCs and utilities, who have been aggressively deploying local fiber facilities[48] – essentially eliminate the need for reliance on ILEC special access/private line facilities.[49] Indeed, the ILECs themselves have begun to rely on these expansive networks as an alternative source of fiber.[50] Consequently, contrary to the assumptions underlying the UNE Remand Order, each CLEC does not need to deploy an entire interoffice network in order to compete in the special access/private line market – and third-party suppliers are eager to market capacity to competitors even without being

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[46] *Id.* KMC, which has built fiber networks in 37 Tier 3 markets, is just one example of a company that focuses on deploying fiber in smaller cities. *See* "KMC Targets Efficiency in Face of Tough Market," Telecommunications Reports, April 2, 2001, at 33-35)(citing KMC's "full facilities-based approach," which obviates the need for KMC to use the ILEC facilities).

[47] Petition of Coalition of Competitive Fiber Providers, *supra*, at 1.

[48] Fact Report at 20-22.

[49] *See* Fact Report at 14-20 for source references and additional examples.

[50] Fact Report at 17.

compelled to do so.[51] The development of such a wholesale market, as several CLECs expressly conceded in the UNE Remand proceeding, precludes an impairment finding.[52]

In addition to fiber wholesalers, the CLECs themselves often bypass ILEC central office space. The tremendous increase in local fiber miles and buildings served by competitive fiber strongly suggests that many CLECs are connecting special access customers directly to IXCs without collocating in ILEC offices.

Moreover, CLECs regularly build out facilities directly to end users. For example, WorldCom's municipal networks "include spurs ... for connectivity to large buildings and office parks." Intermedia will connect its fiber rings to "the main Class-A buildings in a downtown business district." Time Warner's network "typically extends beyond the ring all the way to end-user buildings." MFN will "bring our fiber right up to our customers' floors in their buildings and provide them with wall-to-wall seamless connectivity." Fiberworks states that its network is "available" to all businesses that "pass within 6000 feet" and "provides the fiber-optic link from its access network directly into the building." Level 3 has deployed "multi-conduit, upgradeable local city networks" in 26 cities, with plans for 30 more, which connect its "intercity network gateway sites to ILEC and CLEC central offices, long distance carrier POPs, buildings housing communication-intensive end users and Internet peering and transit facilities." And Global

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[51] *Cf.* UNE Remand Order, ¶ 351 ("to the extent that there may be excess capacity along these fiber routes, non-incumbent providers of competitive transport facilities are under no legal obligation to offer their excess capacity to their competitors").

[52] *See* UNE Remand Order, ¶ 56

Crossing is "constructing a series of city rings to provide connections on a building-to-building scale," which will enable customers to "bypass the need for LEC local loops."[53]

In addition, non-ILEC collocation alternatives are burgeoning, with multiple collocation "hotels" available in 49 of the top 50 MSAs – and an average of six such hotels in each of the top 25 MSAs.[54] These collocation hotels "greatly facilitate bypass by giving multiple competitive local carriers and interexchange carriers points at which to interconnect."[55] They "put telecom gear as close as possible to the incumbent central office without actually being there," allowing "[m]ost new business telecom providers ... to bypass the traditional infrastructure."[56] ILEC facilities, in short, are just one option among many for providing special access/private line services.

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[53] *See* Fact Report at 12-21 for cites to source material and additional examples. In addition, non-fiber alternatives, such as fixed wireless networks, increasingly are being used to provide special access. Fact Report at 23-24. The availability of fixed wireless significantly reduces cost and timeliness concerns. For example, XO Communications reports that it "establishes a wireless link to buildings first and later builds fiber to the buildings after the company has reached its desired customer penetration to justify building." Fact Report at 14. The wireless equipment then can be moved to another building, avoiding the need for duplicate investments. Fixed wireless links can be deployed much more rapidly than the six to twelve months that the Commission considers untimely. *See* UNE Remand Order, ¶ 89. Moreover, the Commission itself recently acknowledged that "[f]ixed wireless operators can act as strategic partners with wireline CLECs that wish to extend their fiber networks more cheaply" to buildings without fiber access. Fifth CMRS Report, at E-2.

[54] Fact Report at 8 and Appendix A

[55] Fact Report at 8.

[56] *Id.* (citing trade press articles).

Finally, the statements of CLECs and fiber wholesalers confirm that non-ILEC alternatives to high-capacity loop/dedicated transport combinations are widely used to "replace" or "eliminate" ILEC facilities and services[57]:

- Adelphia Business Solutions reports that "[t]he broad deployment of fiber optic cable in Adelphia Business Solutions' markets typically enables connectivity among the Company, the incumbent local exchange carrier ('LEC') central offices and the Company's customers."

- Multiple CLECs (including WorldCom, Intermedia, KMC, and Time Warner) state that they routinely extend their fiber rings to large customers.[58]

- Allegiance has leased fiber from suppliers in 19 markets, and has stated that "[t]hese fiber rings are expected to provide Allegiance with a reliable diverse connection to most of its central office collocations throughout a market."

- CTC has purchased from "a number of dark fiber suppliers" local fiber that will "extend [its] existing high bandwidth fiber network backbone to Verizon local switching offices" and enable it to "eliminate the need for leased inter-office Verizon facilities."

- American Fiber Systems is building fiber optic rings in 131 cities in 41 states to "unite the switching facilities of local telephone companies, Internet companies, utilities, and long distance companies," enabling its customers to "lease a dark fiber optic network solution" that "eliminat[es] the frustration of dealing with ILECs and the expense of building your own network."

- Fiberworks states that its network is "available" to all businesses that "pass within 6000 feet."

- WinStar has entered a deal with MFN under which MFN "will deploy fiber into buildings designated by WinStar in each market, including WinStar hub sites and central offices"; it states that this agreement "will replace high-cost leased facilities and dramatically expand our ability to provide end-to-end broadband services for our customers."

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[57] Citations and additional quotes are contained in the Fact Report at pages 12-24.

[58] Time Warner, for example, says that its fiber network "typically extends beyond the ring all the way to end-user buildings." *See* Fact Report at 12.

As these testimonials and the data reported above indicate, competitive high-capacity loop/transport facilities are available in a timely, ubiquitous, high-quality, cost-effective fashion both from wholesale carriers and through self-supply. This is not a case where competitive fiber is available only on "limited point-to-point routes,"[59] as the Commission suggested in the UNE Remand Order. Rather, alternatives to ILEC special access and private lines are present wherever there are customers who demand those services, and if competing alternatives are not already in place, they can be provided quickly and economically.[60] Under such circumstances, there can be no finding of impairment.

D. The Commission May Not Require UNE Combinations That Rely on UNEs for Dedicated Transport or High-Capacity Loops.

As demonstrated above, requesting carriers are not impaired in the provision of special access and private line services without access to a high-capacity loop/dedicated transport UNE. Indeed, as is shown in the attached Joint Petition of BellSouth, SBC, and Verizon, requesting carriers do not need access to the piece parts of that combination: ample alternatives exist outside the ILEC's network for both high-capacity loops and dedicated transport. Consequently, in addition to the extensive and independently sufficient basis presented in these Comments for

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[59] UNE Remand Order, ¶ 346.

[60] As explained in detail in the attached Joint Petition, the analysis of dedicated transport in the UNE Remand Order mistakenly assumed that all ILEC central offices are directly connected to one another and to competitive POPs. In reality, only certain offices are directly connected to IXC POPs and few are directly connected to one another. The key for analyzing impairment is whether competitive facilities are available for those offices that are connected directly to one another and to IXC POPs (which are also the offices where special access demand is concentrated). As the Fact Report demonstrates, those are precisely the routes where collocation and competitive fiber facilities are concentrated, confirming that there is no impairment.